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12702 VIA CORTINA  
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EXAMINER

MI, QIUWEN

ART UNIT

PAPER NUMBER

1655

MAIL DATE

DELIVERY MODE

01/27/2010

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/571,749	<b>Applicant(s)</b> EWE, CHOR EE	
	<b>Examiner</b> QIUWEN MI	<b>Art Unit</b> 1655	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 11 December 2009.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-8 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-8 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 13 March 2006 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948)                        | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### **CONTINUED EXAMINATIONS**

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 12/11/2009 has been entered.

Applicant's amendment in the reply filed on 10/15/09 is acknowledged. Claims 1-8 are pending. **Claims 1-8 are examined on the merits.**

Any rejection that is not reiterated is hereby withdrawn.

### **Claim Objections**

Claim 8 is newly objected to because of the following informalities: Claim 8 recites "heating the herb inside the herbal pack with heat produced by the flexible heater pad **to to** cause a vaporized herbal essence to be emitted form said herb and..." in lines 21-23, and it is redundant to recite "to" twice.

### **Claim Rejections –35 USC § 112, 2<sup>nd</sup>**

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

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Claims 1-8 are newly rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 (lines 23-24) recites “said material forming said flexible herbal pack retainer allows...”, and the recitation is very confusing and it is not clear what Applicant is trying to claim.

Therefore, the metes and bounds of claims are rendered vague and indefinite. The lack of clarity renders the claims very confusing and ambiguous since the resulting claims do not clearly set forth the metes and bounds of the patent protection desired.

All other cited claims depend directly or indirectly from rejected claims and are, therefore, also, rejected under U.S.C. 112, second paragraph for the reasons set forth above.

### **Claim Rejections –35 USC § 102**

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 3, and 6-8 are newly rejected under 35 USC § 102 (b) as being anticipated by Bo (CN 1325665 A).

Bo teaches a type of electrothermal device and an electrothermal medical bag made of said device, comprising a Chinese medicine bag (thus an herbal applicator, thus an herbal pack

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containing an herb), wherein it is characterized by: one side of the electrothermal device is attached to a warming support material (thus a flexible herbal pack retainer that retains the herbal pack in contact with said flexible heater pad) (thus a top member) (thus the first attachment means). The other side (thus a bottom member) (thus a second attachment means) is attached to a Chinese medicine bag. It is packed and fixed in a bag to complete the electrothermal medicine bag (page 2, claim 2). Bo also teaches a type of electrothermal medicine bag using claim 2 of the patent application claims, wherein it is characterized by: connect the power source and place the Chinese medicine bag of the electrothermal medicine bag on the body at the location to apply heat for fomentation (page 2, claim 3). Bo also teaches the aforementioned warm support material refers to sponge, cotton, a multi layered fabric, rayon, artificial leather, fur or similar manufactured warm support material (page 4, 2<sup>nd</sup> paragraph from the bottom) (thus a material which is permeable to a vaporized herbal essence produced by heating the herb contained in the herbal pack) (thus a flexible material that enables said housing to easily adapt to contours of the body). The aforementioned electrothermal device, Chinese medicine bag, soft support, warm support material, and fabric area are of the same suitable shape and can be made into a square, rectangle, circular, oval, triangular, glove, or sock shape, etc (thus a flexible heater pad that is engaged with the flexible housing, thus a flexible housing configured to be easily attached on to said body) (thus a flexible material that enables said housing to easily adapt to contours of the body) (thus a flexible housing which can be easily attached on to the body of a user) (page 5, 2<sup>nd</sup> paragraph). Connected to a power supply (thus an electrical power source that is connected to the flexible heater pad), the Chinese medicine bag of the electrothermal medicine is placed on the body, or the hand or the foot is placed within the electrothermal medicine bag to apply heat at

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that location for fomentation (page 5, 3rd paragraph). The low voltage, high temperature, large area, even heat distribution, parallel connection of the electrothermal wire of the electrothermal device of the present invention can be used to make a single electrothermal device or two individually separated electrothermal devices. Said electrothermal device can also be made into an electrothermal medicine bag. When used, the lowest temperature it can reach between it and the skin is 45 degree C (thus an adjustable temperature controller that regulates heat generated by said flexible heater pad). It uses low voltage which is safe, the fomentation area is large, it is easy to manufacture, it is low cost to manufacture, it is clearly effective, it is easy to use, it has great market potential, and it is easy to promote (page 5, 4<sup>th</sup> paragraph). Bo also teaches prepare: largehead atractylodes rhizome, poria sclerotium, baked ginger, cinnamon, cardamom, Medicine terminalia fruit, nutmet, fructus evodiae, paoralea fruit, and sharpleaf galangal fruit, etc, additives. Bake in an oven at 70-80 degree C. Crush into a powder. Pack into bags and apply to a thickness of approximately 2 mm. Sew to fix to complete a type of square shaped electrothermal medicine bag (page 6, 2<sup>nd</sup> paragraph) (thus wherein said flexible herbal pack retainer is configured to allow easy removal of the herbal pack from said flexible herbal pack retainer, for a replenishment thereof). Bo further teaches apply one side of the aforementioned electrothermal Chinese medicine bag to the stomach of an infant or child. Connect the power supply. After the electrothermal device heats up, the heat will pass through to the abdomen and the area around contact region and therefore promotes blood circulate at the location of fomentation. At the same time, the Chinese medicine is heated and a large amount of the active ingredients of the medicine is diffused so that there is large amount of volatiles between the bag and the skin at the abdominal region. The volatiles are then absorbed by the skin (thus generate a vapor which is

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communicated to skin of a body of a subject) (thus wherein when the herb inside of the herbal pack is heated by heat generated by said flexible heater pad to a vaporizing temperature, until the herb emits vapors of herbal essence, said material forming said flexible herbal pack retainer allows the vaporized herbal essence to permeate through the flexible herbal pack retainer and onto the skin and concurrently, the flexible herbal pack retainer absorbs part of the heat and helps to reduce the vaporizing temperature). The heat treatment and absorption of Chinese medicine offer a two-fold effect in order to provide fomentation and treatment. The highest temperature between the fomentation bag and skin reaches 45 degree C and is suitable for infant enteritis, diarrhea, bloating, and enterospasms, etc (page 6, last paragraph bridging page 7). Bo teaches apply the medicine pad of the electrothermal medicine bag to the lower abdomen region. Apply power to heat and use. Use for disease such as chronic gynecological inflammation, chronic pelvic inflammatory disease, postpartum abdominal pain, ankylenteron abdominal pain, and chronic enteritis, etc. When used for fomentation, the temperature between the electrothermal medicine bag and the skin is as high as 52 degree C (page 8, 2<sup>nd</sup> paragraph from the bottom). Bo teaches apply one side of the Chinese medicine bag of the electrothermal medicine bag onto the skin of the location of fomentation. Connect the power supply to use. Use for disease such as rheumatic disease and rheumatoid arthritis, hypertrophic spondylitis, muscle inflammation, hyperosteo-geny, scapulohumeral peri-arthritis, lumbar muscle strain, lumber disc herniation, cervical spondylosis, tenosynovitis, and neuralgia, etc. The temperature between the electrothermal medicine bag and the skin is as high as 60 degree C (thus wherein the temperature controller regulates the temperature of the flexible heater pad so as to maintain the temperature of the herb at a temperature level below a combustion temperature of the herb and at a sufficient

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temperature to cause the herb contained in the herbal pack to emit said vapors of herbal essence).

Bo also teaches affix the one surface with the two aforementioned Chinese medicine bag of the aforementioned electrothermal device to two joints on the body. Connect the power supply to use. The temperature between the electrothermal medicine bag and the skin is as high as 61 degree C. Use on both shoulder joints, both knee joints, both ankle joints, etc. for fomentation (page 10, 2<sup>nd</sup> paragraph from the bottom).

Therefore, the reference is deemed to anticipate the instant claim above.

### **Claim Rejections –35 USC § 103**

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-4, and 6-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bi as applied to claims 1, 3, and 6-8 above, and further in view of Church et al (US 6,572,871).

The teachings of Bo are set forth above and applied as before.

The teachings of Bo do not specifically teach a top member comprising a strap means, or a first and second attachment means comprising hook and loop fasteners.

Church et al teach a heating wrap for placement against an injured/painful area of a person's body (thus applied directly on to the skin of the body) and an analgesic cream being



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placed between the heating wrap and the injured/painful area. Church et al further teach that the preferred list of ingredients for analgesic cream comprising aloe vera gel, garden balsam leaf extracts, coconut waxes, jasmine essence, willow extract, echinacea, horsechestnut extract etc (col 3, lines 60-68; col 4, lines 1-10) (thus an herbal applicator). The added heat from the heating wrap enhances the permeability of the skin and tendency of the cream to permeate into the skin (thus emit heat to reach a determined vaporizing temperature). The heat wrap may be a pad that includes a flexible sleeve (flexible main housing) for receiving and surrounding the pad, plus a set of straps for holding the pad or pad/sleeve combination on the body area that is to be treated (thus easily adapts to the contours of the body) (thus affixed with an attachment means and a corresponding attachment means is affixed on to the herbal pad retainer, the said attachment means is to facilitate easy removal and attaching of the herbal pad). The preferred heating wrap includes a thin sheet (top member) that will absorb water, which sheet (thus a fabric) may be dampened with water (thus prevent the heat generated from the heater pad from being dispersed to the outside) and inserted between the heating pad (bottom member) (thus made up of two sections, and allow easy removal of the herbal pack for replenishment) (thus contain the heat generated by the heater pad within to heat the herbs effectively) and surrounding flexible sleeve (heater pad retainer), for providing moist heat treatment (see Abstract). Church et al also teach that the preferred heating means is an electrical heating pad that is thermostatically-controlled (thus adjustable temperature controlled, for regulating the required temperature of the heater pad in order for it to vapourize the herbs contained in the herbal pack) (thus maintain the vaporizing temperature at a temperature level below combustion but sufficient to cause the herbs contained in the herbal pack to emit said vapors of herbal essence) (col 1, lines 50-55). At last, Church et al

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teach that the addition of heat causes a deep-heating of the body tissue, without over-heating the skin, which increases the skin's permeability to the cream, and consequently increased deep-penetration of the herbal (thus it absorbs part of the heat and helps to reduce the vaporizing temperature), analgesic, anti-inflammatory, and other ingredients of the cream (col 3, lines 7-15) (thus when the herbs inside the herbal pack are heated, until they vaporize, the herbal pack retainer then will allow the vaporized herbal essence to permeate through it and onto the skin and at the same time absorb part of the heat the helps to reduce the vaporizing temperature to the curie temperature). Church et al again teach placing the heating wrap over the affected body area and secure firmly yet comfortably with the elastic straps by wrapping the strap ends around the body part to be treated and connecting the hook and loop patches together (claim 5).

It would have been *prima facie* obvious for one of ordinary skill in the art at the time the invention was made to use top member comprising straps, and a first and second attachment means comprising hook and loop fasteners from Church et al since Church et al teach placing the heating wrap over the affected body area and secure firmly yet comfortably with the elastic straps by wrapping the strap ends around the body part to be treated and connecting the hook and loop patches together. Therefore, it would have been *prima facie* obvious for one of ordinary skills in the art to use a flexible medicinal bag comprising straps, and a first and second attachment means comprising hook and loop fasteners so as to wrap over the affected body area of the subject.

Since both Bo and Church et al yielded beneficial results in treating human body with herbal applicator (col 1, lines 29-37), one of ordinary skill in the art would have been motivated to make the modifications to combine the teachings of the references together.

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From the teachings of the references, it is apparent that one of the ordinary skills in the art would have had a reasonable expectation of success in producing the claimed invention.

Thus, the invention as a whole is *prima facie* obvious over the references, especially in the absence of evidence to the contrary.

Claims 1, 3, and 5-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bi as applied to claims 1, 3, and 6-8 above, and further in view of Smith, III et al (US 2003/0069618).

The teachings of Bo are set forth above and applied as before.

The teachings of Bo do not specifically teach an electrical source that is battery.

Smith, III et al teach a method comprising heating the selected area to a sustained skin temperature, using a device comprising a heat source capable of conductively heating the selected area. The method also comprises administering simultaneously a topical composition containing an active agent (see Abstract), such as flavonoid compounds obtained as extracts from natural sources (e.g. plants) [0067] (thus an herbal applicator). Smith, III et al also teach that the term “wearable device”, which includes the term “sleeve”, means a substantially flexible section of material in the form of, for example, a wrap, patch, cuff or a bandage which may be placed on/confirm to which may be held adjacent, selected area of the body (thus a flexible main housing which can be easily attached on to the body). Such as a wrap, patch, cuff or bandage may be formed from a substrate, preferably a disposable substrate (thus allow easy removal of the herbal pack for replenishment). The sleeve may, in addition, be dimensioned and adapted to apply compression. The sleeve in the form of a wrap, patch, cuff or bandage may be held in place by the use of straps or fasteners. For example, one side of the sleeve may be connected to

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the other side of the sleeve, using buttons, Velcro or the like [0055]. Smith, III et al further teach that the device can be either actively AC or DC powered (electrical, battery, etc) [0092]. Smith, III et al teach that a heating pad is prepared. Coated thermal resistance wire is sewn to a semi-rigid nylon (thus made up of two sections). Excess mesh is folded over the wire and both sides of the wire and mesh are wrapped with, and sewn to, a polyester nonwoven batting (heater pad retainer). The end of the resistance wire is connected through bimetallic thermal safety switches to an A.C. power source at 120 volts. A controller integral to the power cord includes a phase fired switch to create a user-adjustable temperature control (thus affixed with a flexible heater pad that connects to an electrical power source to be regulated by an adjustable temperature controller) (thus when the herbs inside the herbal pack are heated, until they vaporize, the herbal pack retainer then will allow the vaporized herbal essence to permeate through it and onto the skin and at the same time absorb part of the heat and helps to reduce the vaporizing temperature to a curie temperature). The entire assembly is wrapped and sealed in waterproof vinyl. A covering of soft polyester is wrapped over the vinyl, and two Velcro straps are sewn to the covering [0100]. Smith, III et al further teach that four additional layers of the same substrate, which is thermally insulating, are placed contiguous to the first substrate on the side away from the wires, and sewn together, to provide insulation against heat loss from one side of the pad (thus prevent the heat generated from the heater pad from being dispersed to the outside) but no insulation on the skin in contact side. This arrangement is particularly beneficial in enabling low power and in facilitating therefore, the use of batteries (portable battery) as a power source.

It would have been *prima facie* obvious for one of ordinary skill in the art at the time the invention was made to use the portable battery from Smith, III et al since Smith, III et al teach

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the heating device with portable battery yielded beneficial results in cosmetic treatment of skin conditions such as regional fat deposits, one of ordinary skill in the art would have been motivated to make the modifications to combine the teachings of the references together. Furthermore, Since Bo teaches using a 12 volt matched power supply; and using low voltage which is safe, it would have been obvious for one of the ordinary skills in the art to use a battery as a power supply.

From the teachings of the references, it is apparent that one of the ordinary skills in the art would have had a reasonable expectation of success in producing the claimed invention.

Thus, the invention as a whole is *prima facie* obvious over the references, especially in the absence of evidence to the contrary.

Applicant's arguments, regarding cited references do not teach any herbs in a structure that corresponds to Applicant's claimed "herbal pack" have been fully considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of Bo.

### **Conclusion**

No claim is allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Qiuwen Mi whose telephone number is 571-272-5984. The examiner can normally be reached on 8 to 5.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on 571-272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Qiuwen Mi/

Examiner, Art Unit 1655